

**In re: BARNESVILLE LIVESTOCK SALES CO. AND GARY W. FOGLE.  
P&S Docket No. D-00-0007.  
Decision and Order.  
Filed November 1, 2002.**

**P&S – Default – Payment, failure to make full – Account, failure to maintain custodial – Funds on deposit, failure to maintain adequate.**

Charles Spicknal, for Complainant.  
Respondent, Pro se.

*Decision and Order issued by James W. Hunt, Administrative Law Judge.*

This proceeding under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*), hereinafter the “Act,” was instituted by a complaint filed on June 21, 2000, by the Deputy Administrator, Packers and Stockyards Programs, Grain Inspection, Packers and Stockyards Administration (GIPSA), United States Department of Agriculture alleging that the Respondents willfully violated the Act. The complaint and a copy of the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. § 1.130), hereinafter the “Rules of Practice,” were served on the Respondents.

The Hearing Clerk’s letter of service accompanying the complaint informed the Respondents that their answers to the complaint were to set forth any defenses that they wished to assert and that they were to specifically admit, deny or explain each allegation of the complaint. The letter went on to explain that “filing an answer which does not deny the material allegations of the complaint, shall constitute an admission of those allegations and a waiver of your right to an oral hearing.” Letter from Joyce A. Dawson, Hearing Clerk to Respondent Barnesville Livestock Sales Co. (dated June 22, 2000). In a letter response dated July 10, 2000, Respondents failed to deny the material allegations in the complaint. Instead, Respondents asserted that Barnesville Livestock Sales Co. (“Barnesville Livestock”) was working to obtain a bank loan and that the money necessary to cure the complaint violations would be “in place with in 30 to 60 days. *See* Letter from Gary Fogle to Hearing Clerk (dated July 10, 2000) (emphasis added).

The complaint was subsequently amended on August 23, 2000 and a “Second Amended Complaint” was filed on April 24, 2002. The amended complaints were served on the Respondents and alleged continuing violations of the Act and the regulations promulgated thereunder by the Secretary of Agriculture (9 C.F.R. § 201.1 *et seq.*). Respondents answered both complaints with letter responses asserting that Barnesville Livestock was in the process of obtaining the financing necessary to cure the alleged violations. Respondents did not deny any of the continuing violations alleged in the amended complaints.

Respondents have failed to file an answer denying the material allegations in the Second Amended Complaint, thus, pursuant to section 1.136 of the Rules of Practice (7 C.F.R. § 1.136) the material allegations of fact in the Second Amended

Complaint are deemed admitted. Based on these admissions, Complainant's motion for the issuance of a decision pursuant to section 1.139 of the Rules of Practice, (7 C.F.R. § 1.139) is hereby granted and this Decision and Order are entered without hearing or further procedure.

### **Findings of Fact**

1. Barnesville Livestock Sales Co., hereinafter referred to as "Corporate Respondent," is a corporation organized and existing under the laws of the state of Ohio. Its mailing address is P.O. Box 377, Barnesville, Ohio 43713.

2. Corporate Respondent is and, at all times material herein, was:

(a) Engaged in the business of conducting and operating Barnesville Livestock Sales Co., a posted stockyard under the Act located in Barnesville, Ohio;

(b) Engaged in the business of a market agency selling livestock on a commission basis; and

(c) Registered with the Secretary of Agriculture as a market agency to sell livestock in commerce on a commission basis and furnish stockyard services.

3. Gary Fogle, hereinafter referred to as "Respondent Fogle," is an individual whose mailing address is P.O. Box 377, Barnesville, Ohio 43713.

4. Respondent Fogle is and, at all times material herein, was:

(a) The president of Corporate Respondent;

(b) The owner of 50 percent of the corporate stock issued by Corporate Respondent;

(c) Responsible for the day-to-day direction, management and control of Corporate Respondent;

(d) A market agency within the meaning of and subject to the provisions of the Act; and

(e) The alter ego of Corporate Respondent.

5. Corporate Respondent, under the direction, management, and control of Respondent Fogle, on or about the dates and in the transactions set forth in paragraph II of the Second Amended Complaint, failed to properly use and maintain its Custodial Account for Shipper's Proceeds ("custodial account"), thereby endangering the faithful and prompt accounting therefor and the payment of portions due the owners or consignors of livestock.

6. As more fully set forth in paragraph III of the Second Amended Complaint, the financial condition of the Corporate Respondent does not meet the requirements of the Packers and Stockyards Act.

7. Corporate Respondent, under the direction, management and control of Respondent Fogle, in connection with its operations subject to the Act, on or about the dates and in the transactions set forth in paragraph IV of the Second Amended Complaint, sold livestock on a consignment basis and in purported payment of the net proceeds therefor, issued checks which were returned unpaid by the bank upon

which they were drawn because Corporate Respondent did not have sufficient funds on deposit and available in the custodial account upon which such checks were drawn to pay the checks when presented.

8. Corporate Respondent, under the direction, management and control of Respondent Fogle, in connection with its operations subject to the Act, on or about the dates and in the transactions listed paragraph IV of the Second Amended Complaint, sold consigned livestock on a commission basis and failed to remit, when due, proceeds to its consignors from the sale of livestock.

### **Conclusions**

By reason of the facts found herein, Corporate Respondent's financial condition does not meet the requirements of the Act (7 U.S.C. § 204) and Respondents have willfully violated sections 307 and 312(a) of the Act (7 U.S.C. §§ 208, 213(a)) and section 201.42 of the Regulations (9 C.F.R. § 201.42).

### **Order**

Respondents Gary W. Fogle and Barnesville Livestock Sales Co., their agents and employees, directly, or through any corporate or other device, in connection with their activities subject to the Packers and Stockyards Act, shall cease and desist from:

1. Failing to deposit in the Custodial Account for Shippers' Proceeds, within the time prescribed by Section 201.42 of the Regulations (9 C.F.R. § 201.42), amounts equal to the proceeds received or due from the sale of consigned livestock;
2. Failing to otherwise maintain the Custodial Account for Shippers' Proceeds in strict conformity with the provisions of Section 201.42 of the Regulations (9 C.F.R. § 201.42);
3. Using funds received from the sale of consigned livestock for purposes of their own or for any purpose other than payment to consignors of the amount due from the sale of their livestock and the payment of lawful marketing charges;
4. Engaging in the business of a market agency while insolvent with current liabilities exceeding current assets;
5. Issuing checks in payment for livestock sold on a commission basis without maintaining sufficient funds on deposit and available in the account upon which such checks are drawn to pay such checks when presented; and
6. Failing to remit, when due, the full amount owed to consignors following the sale of livestock consigned to Respondents.

Respondents Gary W. Fogle and Barnesville Livestock Sales Co., are hereby suspended as registrants under the Act for a period of forty-nine (49) days and thereafter until the custodial account shortage and insolvency have been eliminated

Pursuant to the Rules of Practice governing procedures under the Act, this Order

shall become final without further proceedings thirty-five (35) days after service hereof, unless appealed to the Secretary by a party to the proceeding within thirty (30) days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139 and 1.145).

Copies of this Decision and Order shall be served upon the parties.

[This Decision and Order became final January 8, 2003. - Editor]

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